No. 91-1131

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

WINTERTHUR REINSURANCE CORP. OF AMERICA,
Petitioner,

v.

STATE OF CALIFORNIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUPPLEMENTAL MEMORANDUM FOR PETITIONER PURSUANT TO RULE 15.7

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Petitioner, Winterthur Reinsurance Corp. of America ("Winterthur"), respectfully submits this supplemental memorandum in response to the brief filed by the Solicitor General as *amicus curiae* on behalf of the United States.

1. *What Antitrust Standing Test Did The Ninth Circuit Apply?* The Ninth Circuit's ruling on antitrust standing in this case is as confused as the general state of antitrust standing law in the lower courts. In its decision, the Ninth Circuit explicitly states that plaintiffs have standing to sue because "[a]lmost all of the *Associated General Contractors* factors" are satisfied. Winterthur Pet. App. 16a. Needless to say, if the antitrust standing test established by *Associated General Contractors of California, Inc.* v. *California State Council of Carpenters*, 459 U.S. 519 (1983), requires a plaintiff to satisfy *all* the

standing factors set forth therein, it is not enough for a plaintiff merely to satisfy "almost" all of these factors. Winterthur has sought certiorari in this case, *inter alia*, to allow this Court to clarify whether a plaintiff must satisfy *all* of the *Associated General Contractors* factors to have standing.

As set forth in Winterthur's petition (Winterthur Pet. 11-18), there is considerable confusion in the lower courts regarding the proper application of the *Associated General Contractors* test. The Solicitor General does not suggest otherwise. Instead, the Solicitor General argues that this Court should not attempt to clarify the scope of *Associated General Contractors* in this case, because "the court of appeals *appears* to have concluded that each of the *Associated General Contractors* factors favored standing." U.S. Br. 19 (emphasis added). According to the Solicitor General, the Ninth Circuit's statement that "almost all" the *Associated General Contractors* factors were met should not be accepted at face value.[1] *Id.* at n.16.

As the Solicitor General appears to recognize, the Ninth Circuit's standing analysis is not a model of clarity. Unfortunately, antitrust standing analysis in the lower courts is too often plagued by inconsistencies of this sort.

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[1] Specifically, the Solicitor General acknowledges that, "standing alone," the above-cited statement by the Ninth Circuit indicates that not all the *Associated General Contractors* factors were met. U.S. Br. 19 n.16. Nevertheless, the Solicitor General "suggests" that the Ninth Circuit was merely referring to "findings" as to the complexity of damages and the risk of duplicative recovery, and that by concluding that "the net balance as to damages is in favor of standing," the Ninth Circuit in essence found that *all* factors were met. *Id.* Yet "damages" is not a single factor; rather, it describes several of the distinct *Associated General Contractors* factors (complexity; speculativeness; duplicativeness). Even if the Solicitor General were correct in his interpretation of the Ninth Circuit's ruling, the fact that the "net balance" of *all* damage factors favors standing does *not* mean that *all* the *Associated General Contractors* factors have in fact been met.

That is precisely why this Court should grant certiorari. In the nine years since *Associated General Contractors* was decided, the lower courts have failed to come to any consensus as to how the *Associated General Contractors* standing test should be applied. This Court should not forgo this opportunity to ensure that the lower courts properly apply the analytical framework set forth in *Associated General Contractors*. The Solicitor General's attempted reconciliation of the internal inconsistencies in the Ninth Circuit's analysis should not be the basis for denying certiorari.[2]

2. *This Case Is Not Controlled By This Court's Decision In The McCready Case.* The Solicitor General also argues that certiorari should be denied because plaintiffs' position in this case is comparable to the position of the plaintiff who was granted standing in *Blue Shield of Va.* v. *McCready*, 457 U.S. 465 (1982). This is simply not so. In *McCready*, the plaintiff had standing to sue Blue Shield because she was *directly* injured by Blue Shield's refusal to reimburse *her* for payments that she had made to her psychologist. There was no other direct victim in the *McCready* case. As the *McCready* Court expressly ruled, the plaintiff's psychologist (the alleged "target" of the Blue Shield boycott) could assert "no claim of injury," because the psychologist had been "fully paid" by the plaintiff and was *not* affected by Blue Shield's refusal to reimburse the plaintiff. *Id.* at 475.

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[2] In another footnote, the Solicitor General also suggests that "it is not clear" that Winterthur preserved its standing arguments on appeal, since the standing issue was addressed in a footnote rather than in the text of petitioners' brief in the court of appeals. U.S. Br. 18 n.15. Yet, as the Solicitor General concedes, the court of appeals in fact decided the supposedly unpresented issue—"the plaintiffs have standing to maintain this antitrust suit against *all* defendants." Winterthur Pet. App. 17a (emphasis added). Moreover, as noted in its Petition for Certiorari, Winterthur also filed a separate, independent joinder to the petition for rehearing in the court of appeals that expressly raised the standing issue. Winterthur Pet. 5-6 n.4.

In short, in *McCready*, the plaintiff clearly suffered a direct injury; the other potential plaintiff (her psychologist) suffered no such injury. The facts of *McCready* are a far cry from the facts of this case, where "the action of the reinsurers took effect through the primary insurers" (Winterthur Pet. App. 15a), and where the alleged *direct* victims (*i.e.*, the primary insurers) could sue if they were so inclined.[3]

3. *Plaintiffs' Alleged Injuries Were Not Direct.* It is undisputed that Winterthur never sold (or refused to sell) insurance to plaintiffs or other consumers. Winterthur sold reinsurance only to other insurers. Nevertheless, the Solicitor General argues that plaintiffs should have standing to sue Winterthur because Winterthur and other reinsurers allegedly conspired with four *primary* insurers, who sell directly to consumers. In the Solicitor General's view, the allegation that four primary insurers conspired with Winterthur and other reinsurers makes this case "analogous to resale price maintenance" cases—where consumers have been granted standing to sue both the dealer from whom they purchased and the manufacturer who engaged in the vertical price-fixing conspiracy with the direct-selling dealer. U.S. Br. 20-21.

The Solicitor General's characterization of the case, however, cannot withstand analysis. Plaintiffs do *not* allege that Winterthur conspired with each primary insurer who sold (or refused to sell) to plaintiffs. Far from it. There are over 1400 primary insurers nationwide. See U.S. Br. 2. Only four of these primary insurers are

[3] Thus, the risk of duplicative recovery was not present in *McCready*. Here, however, that risk is clearly present, since non-defendant primary insurers might well file suit. The Solicitor General, acknowledging the risk that primary insurers might also sue, seeks to minimize this risk by speculating that primary insurers "presumably would allege a different type of injury." U.S. Br. 21. In fact, it is more likely that primary insurers would allege exactly the same type of injury as insurance consumers—*i.e.*, that the alleged conspiracy made it impossible or more costly to obtain the insurance product they wanted.

alleged to have conspired with Winterthur; the remainder were allegedly the *victims* of this purported conspiracy. According to plaintiffs' allegations, the four defendant primary insurers induced Winterthur (and other reinsurers) to refuse to offer reinsurance to the 1400 nonconspiring primary insurers.

Thus, Winterthur's alleged misconduct consists of its refusal—induced by the defendant primary insurers—to sell *reinsurance* to the nondefendant primary insurers. None of the primary insurers is alleged to have participated in a "vertical conspiracy" that is analogous to a "resale price maintenance" scheme. The 1400 nondefendant primary insurers are alleged victims, not conspirators; they—not plaintiffs—suffered the most direct alleged injury. As a result, the problems of complex damage apportionment and the risks of duplicative recoveries are present notwithstanding the allegations that four of the primary insurers induced the alleged refusal to sell reinsurance.

Indeed, even the four defendant primary insurers are not in the same position as a direct-selling dealer in a vertical price-fixing case. Plaintiffs' allegation is *not* that the reinsurers induced the four defendant primary insurers to refuse to offer insurance policies to consumers; rather, plaintiffs' allegation is that the four defendant primary insurers induced the reinsurers to refuse to offer reinsurance to other primary insurers. There is simply no vertical link between the reinsurers and the consumer plaintiffs.

By the same token, plaintiffs should not be able to create standing simply by alleging that Winterthur's refusal to sell reinsurance was "intended to disrupt" the primary insurance market. U.S. Br. 19. Intent alone is insufficient as a matter of law to create standing, even when combined with a claim of consequential harm flowing from an alleged antitrust violation. *See, e.g., Associated General Contractors*, 459 U.S. at 545. Moreover, the fact that a refusal to sell in one market has reper-

cussions in an adjacent market cannot suffice to confer standing upon all consumers in the adjacent market. See Winterthur Pet. 23-24. When all is said and done, plaintiffs are still consumers of primary insurance, and Winterthur and other reinsurers are still sellers *only* of reinsurance. Plaintiffs are *not* consumers of the product sold by reinsurers; any injury suffered by them is by definition an "indirect" injury.

* * * *

In the final analysis, it remains undisputed that the *Associated General Contractors* test for antitrust standing is currently being applied in divergent ways by the lower courts. This case presents an opportunity for this Court to eliminate the confusion that is reflected in the lower courts' application of that test. Winterthur respectfully submits that its petition for certiorari should be granted.

Respectfully submitted,

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